In the

Supreme Court of the United States

1978 TERM

No. 78-1933

STEVEN H. MONTGOMERY, Individually and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY,

Petitioner,

v.

CENTURY LAMINATING, LTD.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONER

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INDEX

LIST OF AUTHORITIES CITED

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BRIEF OF PETITIONER

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Steven H. Montgomery, individually and d/b/a Laminating Company of Colorado, and d/b/a American Laminating Company, the petitioner herein, prays that the Order of the Court of Appeals for the Tenth Circuit dismissing Appeal No. 77-1541 be reversed and the matter be remanded to said court for consideration on the merits of the petitioner's appeal from the United States District Court for the District of New Mexico in Action No. 76-197-P.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 595 F.2d 563 and is printed in Appendix A to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1). The judgment of the Court of Appeals for the Tenth Circuit was made and entered on April 2, 1979 (Appendix to Petition A-1). The Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was filed with the Supreme Court on June 28, 1979.

STATUTES AND FEDERAL RULES INVOLVED

The pertinent portions of Rule 4 of the Federal Rules of Appellate Procedure and 28 U.S.C. §1291 are set forth in Appendix C and D to the Petition for Writ of Certiorari.

QUESTION PRESENTED FOR REVIEW

A jury verdict was returned against the petitioner. Subsequently, the petitioner filed a Motion for Judgment *non obstante veredicto* and the respondent filed a Motion for an Injunction. Thereafter, but prior to the trial court's ruling on the then pending motions, the petitioner filed a Notice of Appeal. The Trial Court denied the petitioner's Motion for Judgment *non obstante veredicto* and granted the respondent's Motion for an Injunction. On appeal, the Court of Appeals for the Tenth Circuit, upon the respondent's motion, concluded that the Notice of Appeal was premature and therefore the Court of Appeals was without jurisdiction to hear the merits of the case. The appeal was dismissed for want of jurisdiction. The question presented for review is:

When a Notice of Appeal is filed prior to the entry of final judgment, may the Court of Appeals accept the Notice of Appeal as if it were filed for review of the final judgment and exercise jurisdiction pursuant to 28 U.S.C. §1291, or does the premature filing of the notice of appeal deprive the Court of Appeals of jurisdiction?

STATEMENT OF THE CASE

This action was originally filed in the New Mexico State courts and removed to the United States District Court for the District of New Mexico. The respondent sought damages and injunctive relief for the breach of a contract. The petitioner asserted a counterclaim alleging violation of Federal Anti-Trust Laws and breach of contract.

The sequence of material facts following the jury trial is as follows:

1. On May 10, 1977, Judgment was entered on the jury verdict against the petitioner (Petition Appendix B-1).

2. On May 19, 1977, the petitioner filed his Rule 50(b) Motion for Judgment *non obstante veredicto* (hereinafter Motion for Judgment *n.o.v.*) (A. 9).

3. On May 19, 1977, the respondent filed its Motion for an Injunction (A. 12).

4. On June 10, 1977, the petitioner filed his Notice of Appeal (A. 14).

5. On June 14, 1977, the United States District Court for the District of New Mexico (hereinafter the Trial Court) denied the petitioner's Rule 50(b) Motion for Judgment *n.o.v.* (A. 15).

6. On August 9, 1977, the District Court entered an injunction (A. 16).

7. On September 7, 1977, the petitioner filed a Motion for Stay of Injunction.

8. On November 9, 1977, the District Court denied the Motion for Stay of Injunction.

9. No notices of appeal were filed other than the June 10, 1977 notice in paragraph 4 above.

On appeal, the petitioner urged a number of grounds for reversal of the Trial Court judgment. These issues, not pertinent herein, were thoroughly briefed by the parties. The respondent filed a motion to dismiss the appeal as being untimely. The motion was denied by the Court of Appeals (with leave to renew the motion at the time of oral argument). The motion was renewed by the respondent at oral argument, and it is on the basis of that motion that the Court of Appeals concluded that it was without jurisdiction to hear the appeal on the merits. The appeal was dismissed (Petition Appendix A-9).

ARGUMENT

The decision below should be reversed and the cause remanded to the Court of Appeals for a decision on the merits of the appeal filed by the petitioner, and briefed by the parties. To permit the dismissal of the appeal to stand would be to sanction an overly technical interpretation of procedural rules, stifling valuable legal rights of the petitioner herein. Such an action would be contrary to the rulings of a majority of the Circuit Courts of Appeal, and contrary to the spirit and purposes of the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure.

At the outset, the petitioner must note that he does not contest the fact that the judgment entered on the jury verdict on May 11, 1977 (P.A.B-1) was not a final judgment, as the petitioner subsequently filed a Motion for Judgment *n.o.v.* (A. 9). It is the petitioner's position that the filing of the Notice of Appeal prior to the court's ruling on petitioner's Motion for Judgment *n.o.v.* did not create a fatal impediment to the court's jurisdiction to review the case on its merits. Although the Notice

of Appeal was filed prematurely, it properly and adequately advised the respondent that an appeal was being taken. Since the Trial Court denied the Motion for Judgment *n.o.v.* (A. 9) and thus did not alter the issues on appeal, the Court of Appeals should have accepted jurisdiction. Had the Court of Appeals taken such action, the Court would not have prejudiced the rights of the petitioner.

In its decision, the overwhelming concern of the Court of Appeals is that the Finality Doctrine not be eroded. *Century Laminating, Ltd. v. Montgomery*, 595 F.2d 563 (10th Cir. 1979). The court begins with the premise that it has only such jurisdiction as is conferred by statute and that the court's jurisdiction is limited to appeals from final decisions. 28 U.S.C. §1291; *United States v. Nixon*, 418 U.S. 683, 690. The court continues by defining a final decision as ". . . one which ends the litigation on the merits and leaves nothing for the court to do but execute judgment." *Century Laminating, Ltd., supra* at 565.

Since the petitioner timely filed a Rule 50(b) Motion for Judgment *n.o.v.*, the court continues, the Trial Court retains jurisdiction to review its judgment, and thus the judgment was not final. Additionally, the petitioner's motion was one of those enumerated in Rule 4(a) of the Federal Rules of Appellate Procedure that terminates the running of time within which to file a Notice of Appeal. Thus, the petitioner's Notice of Appeal was prematurely filed. The court concludes that since the judgment was not final, the petitioner's Notice of Appeal constituted an attempt to appeal a non-final order, and as such was a nullity. It states that the petitioner could properly have perfected an appeal by filing a new notice within thirty days of the order denying the Motion for Judgment *n.o.v. Century Laminating, Ltd., supra* at 568.

The court continues that the danger it is seeking to dispel is the untimely ouster of a trial court from its jurisdiction, upon the filing of a premature Notice of Appeal. The court wishes to prevent Courts of Appeal from assuming trial court

functions, as such an action would violate the historical relationship between trial court and appellate court functions. Accordingly, the court concludes that the Finality Rule established by 28 U.S.C. §1291 is absolute, and the petitioner's Notice of Appeal was of no effect.

The Tenth Circuit fails to consider the fact that although the Notice of Appeal was premature, the Trial Court continued with the proceedings, apparently operating under the correct assumption that it had not been deprived of jurisdiction. Under the circumstances, since the matter ripened into a final judgment, no good purpose will be served by depriving the petitioner from an appeal on the merits.

A similar factual situation was presented to the Court of Appeals for the Ninth Circuit in *Ruby v. Secretary of the United States Navy*, 365 F.2d 385 (9th Cir. 1966). In *Ruby*, a Rule 12(b) motion was granted on June 17, 1965. On July 18, 1965, the plaintiff moved to vacate and set aside the order of dismissal. Plaintiff's motion was denied. On July 14, 1965, Ruby filed his Notice of Appeal, and on August 3, 1965, the court dismissed Ruby's complaint. In the Court of Appeals, the Ninth Circuit denied a motion to dismiss the appeal on grounds of prematurity, stating:

> Where, as here, the District Court correctly determines that its jurisdiction has not been ousted by a purported Notice of Appeal, because the latter was not taken from an appealable order, a Notice of Appeal directed to the non-appealable order will be regarded, as in *Firchau*, as directed to the subsequently entered final decision. *Ruby, supra* at 389.

In *Ruby*, the Trial Court understood that it retained jurisdiction notwithstanding the premature Notice of Appeal. In the case at bar, in light of the fact that the Notice of Appeal was filed while motions were pending, the Court understood that its

jurisdiction continued regardless of the premature notice. There was thus no reason to dismiss the petitioner's appeal, as the Tenth Circuit's concern regarding ouster did not materialize.

Also crucial to the evaluation of the present controversy is an understanding of the purpose of a Notice of Appeal. "The purpose of requiring the filing of a timely Notice of Appeal is to advise the opposing party that an appeal is being taken from a specific judgment and such notice should therefore contain sufficient information so as not to prejudice or mislead the appellee." *Markham v. Holt*, 369 F.2d 940, 942 (5th Cir. 1966). In essence, the notice is required to inform the litigants that the matter is not at an end; it is too soon to rely on the District Court's determination. As well, the requirement of filing a Notice of Appeal is mandatory and jurisdictional. *United States v. Robinson*, 361 U.S. 220.

Where the purposes of this particular pleading have been served and the intent of the appealing party is clear, an appeal should not be dismissed for a technical flaw, absent a showing of prejudice to the appellees. *Alexander v. Aero Lodge No. 735*, 565 F.2d 364, 371 (6th Cir. 1977). "In *Firchau, supra*, 345 F.2d at 271, the court suggested that the test was one of prejudice or its absence; that if the premature notice did not adversely 'affect substantial rights' of the prevailing adversary the appeal was saved; conversely, it would not be if substantial rights were thus impaired." *Eason v. Dickson*, 390 F.2d 585, 588 (9th Cir. 1968).

The Tenth Circuit has held that it is proper to permit a premature appeal where the judgment appealed from is not final in technical formality, as in *Morris v. Uhl and Lopez Engineering, Inc.*, 442 F.2d 1247, 1250 (10th Cir. 1971). The argument is being advanced by the respondent that, where judgment is not final because there is a motion enumerated in Rule 4(a) of the Federal Rules of Appellate Procedure pending at the time of the filing of the Notice of Appeal, a premature appeal should not be permitted to ripen, as the ruling on the

pending motion potentially could substantively change the form and content of the judgment. Under the circumstances of this case, the latter argument is specious as the petitioner's Motion for Judgment *n.o.v.* was denied. There was no substantive change in the form of the judgment, and the judgment was final at the time the appeal was considered by the Court of Appeals.

The Second, Third, Fifth, Eighth and Ninth Circuits support the petitioner's position with cases that are factually similar. In *Yaretsky v. Blum*, 592 F.2d 65 (2nd Cir. 1979), the appellants filed a Fed. R. Civ. P.59(e) motion to amend a preliminary injunction. During the pendency of the motion, the appellants filed a Notice of Appeal. The Rule 59(e) motion was subsequently denied. The appellees questioned the jurisdiction of the Second Circuit to hear the appeal on the basis of prematurity. The Court of Appeals concluded that notwithstanding the fact that the notice was filed while a Motion to Amend Judgment was pending, "the better rule is that in the absence of prejudice to the appellee, the court should treat a premature appeal as from a final judgment so as to avoid denial of justice, expense and inconvenience." *Yaretsky, supra*, 66. *Accord, Stokes v. Peyton's, Inc.*, 508 F.2d 1287 (5th Cir. 1975); *Hodge v. Hodge*, 507 F.2d 87 (3rd Cir. 1975); *In the Matter of the Grand Jury*, 541 F.2d 373 (3rd Cir. 1976); *Richerson v. Jones*, 551 F.2d 918 (3rd Cir. 1977).

The Eighth Circuit Court of Appeals, in the recent case of *Williams v. Town of Okoboji*, 599 F.2d 238 (8th Cir. 1979), ruled that an appeal would not be dismissed for prematurity, notwithstanding the fact that the Notice of Appeal was filed while a Fed. R. Civ. P.59(e) motion was under advisement. The court's sole consideration was whether or not the premature notice resulted in prejudice to the appellee.

Similarly, an objection to the jurisdiction of the court was overruled by the Ninth Circuit in *Song Jook Suh v. Rosenberg*, 437 F.2d 1098 (9th Cir. 1971). The objection was interposed on the grounds that the appellant's Notice of Appeal was pre-

mature, having been filed while a Fed. R. Civ. P. Rule 59 motion remained and undecided. The motion was subsequently denied. Circuit Judge Barnes concluded for the court:

> It is true that had the motion [Rule 59] been granted, the judgment would have been vacated and a new judgment ultimately entered. That judgment would then have been the only appealable judgment, and the Notice of Appeal previously filed would have been aborted. Not so here. The motion was denied; the judgment stands; it is the only appealable judgment, it is the one to which the notice refers. To hold, under such circumstances, that the Notice of Appeal is void, and that we have no jurisdiction, would be technical *in the extreme.* Neither the decisions of the Supreme Court nor those of this court require such a result. [Emphasis supplied]. *Song Jook Suh, supra,* at 1099. See *Firchau v. Diamond National Corp.*, 345 F.2d 269 (9th Cir. 1965); *Curtis Gallery and Library, Inc. v. United States*, 388 F.2d 358 (9th Cir. 1967); *Eason v. Dickson*, 390 F.2d 585 (9th Cir. 1968).

While the Ninth Circuit certainly must have been aware of the importance of maintaining the credibility of the Federal Rules of Appellate Procedure, as they are written, the court was not so blinded by the necessity of technical procedural uniformity as to permit the loss of valuable legal rights.

This court has previously not had the opportunity to address the issue herein presented, although it has provided some peripheral guidance. Most pertinent is the court's decision in *Foman v. Davis*, 371 U.S. 178.

In *Foman*, the court was presented with a factual situation wherein the petitioner's complaint was dismissed for failure to state a claim upon which relief might be granted. The day following the dismissal, the petitioner filed motions to vacate the

judgment and amend her complaint. Subsequently, but prior to a ruling on the motions, the petitioner filed a Notice of Appeal. Thereafter, the Trial Court denied petitioner's motions, and the petitioner filed a second Notice of Appeal from the denial. The Court of Appeals dismissed the first appeal as being premature, and determined that the second appeal was effective for the purposes of reviewing the court's denial of the petitioner's motions only.

In a decision delivered by Mr. Justice Goldberg, this court ruled that the second Notice of Appeal, although improperly phrased, was sufficient to review the underlying judgment of dismissal by the Trial Court. "With both notices of appeal before it (even granting the asserted ineffectiveness of the first), the Court of Appeals should have treated the appeal from the denial of the motions as an effective, although inept, attempt to appeal from the judgment sought to be vacated." *Foman, supra,* at 181. Among other reasons, the court based its decision on the fact that the defect in the second Notice of Appeal did not mislead or prejudice the respondent. As well, the court noted that the respondent was notified of petitioner's intent to appeal the Trial Court dismissal. Mr. Justice Goldberg in speaking for a unanimous court on this issue concluded:

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley v. Gibson,* 355 U.S. 41, 48. The rules themselves provide that they are to be construed 'to secure the just, speedy and inexpensive determination of every action.' Rule 1. *Foman, supra,* 181, 182.

The Court's decision in *Foman* is no less compelling in the case at bar.

In the present case, the petitioner intended to perfect an appeal as was recognized by the Tenth Circuit Court of Appeals. *Century Laminating, Ltd. v. Montgomery, supra,* at 569. The respondent was clearly alerted to the fact that the petitioner intended to appeal the judgment of the Trial Court. The respondent has not been heard to allege, nor has it shown, that prejudice will result should the appeal be permitted. The transcript has been prepared. The briefs have been written and need only be updated. No prejudice has resulted nor shall result. However, if the Court of Appeals is affirmed, the petitioner shall lose his right to appeal a judgment that he believes is legally deficient. Circuit Judge Thornberry's words in *Markham v. Holt,* 369 F.2d 940 (5th Cir. 1966) are instructive. "This court has consistently adhered to the policy of exercising all proper means to prevent the loss of valuable rights when the validity of an appeal is challenged not because something was done too late, but rather because it was done too soon." *Markham, supra,* at 942.

As is readily apparent from the number of Circuit Courts of Appeal that have addressed the issue present herein, Rule 4(a) of the Federal Appellate Rules of Procedure has presented prospective appellants with a technical, procedural stumbling block, through its ambiguity. One author has indicated that a premature appeal is regarded as the greatest hazard in attempting to file an appeal successively in the Tenth Circuit. Fromme, *Taking a Tenth Circuit Civil Appeal-Hints and Pitfalls to Avoid,* J. Kansas Bar A., Winter, 1974 p. 251. The petitioner strongly suggests that this Court, through its inherent rule making powers, could clarify the ambiguity of the rule presented herein prospectively. However, it would be improper to permit the Court of Appeals to take such action retrospectively by prohibiting the Petitioner's appeal on the merits.

The petitioner strongly urges that the better rule to adopt is one permitting a premature Notice of Appeal to ripen as to the final judgment, when the notice adequately informs the liti-

gants of an intended appeal and no prejudice results from the prematurity. Such a procedure would adequately take into consideration the underlying policy of the Finality Doctrine, while preserving the potential rights of the litigants.

CONCLUSION

For the reasons stated above, the petitioner respectfully prays that this Honorable Court reverse the actions of the Court of Appeals for the Tenth Circuit and remand the matter to that Court for consideration of the underlying appeal on the merits.

Respectfully submitted,

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